O/a 5-10-85

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Appellant,

-vs- CASE NO. 66,770

CECIL DURDEN, et al.,

Appellees.

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

For the purposes of this brief, the following symbols and references will be utilized:

"R" refers to the Record on Appeal.

Appellees will be referred to as DURDEN and STONE or Appellees.

DEPARTMENT refers to the Department of Transportation.

STATEMENT OF CASE AND FACTS

Appellees, DURDEN and STONE, accept the STATEMENT OF CASE AND FACTS as set forth by the DEPARTMENT except the implication that the Appellees waived Count II of its complaint at the Final Hearing on Count I. (DOT Brief, p. 2)

A review of the Record shows that Appellees filed a two count complaint for injunctive and declaratory relief. (R:1-8) The DEPARTMENT filed two answers; one to each count. (R: 122-135 and 279-280)

The Final Hearing from which this appeal arises is not final as to all issues in the Appellees' complaint. This appeal arises from a determination of Count I only and Count II remains pending. This is shown in the following references to the Record:

1. R: 194 -- See the discussion between Butler and the Trial Court regarding the setting of an expedited final hearing as to Count I and Butler stating it is the Appellees' desire to bifurcate the hearing and that it would be discussed further in Chambers.

2. Counsel for the Appellees represents to the Court that he was present during the in chambers meeting for the setting of the Final Hearing on Count I and that it was clearly understood by the Trial Court, the Appellees and the Department that the Final Hearing set for February 4, 1985, was a hearing solely on Count I. This is further evidenced by the fact that the Department did not file its answer to Count II until February 8, 1985. (R: 279-280)

3. R: 342 -- Counsel for the DEPARTMENT clearly states: "In the instant case, the first hearing dealt solely with the summary removal of the Plaintiffs' signs."

4. R: 277-278 -- see the Order dated February 6, 1985.

SUMMARY OF ARGUMENT

Count I of the Appellees' Complaint is solely concerned with the pre-hearing takedown provisions of Chapter 479.105, Florida Statutes. Subsections (1) and (3) of Chapter 479.105, Florida Statutes violates Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution on its face and as applied to the Appellees. These subsections deny the Appellees due process as an opportunity to be heard prior to a destruction of their signs is not provided for notwithstanding any pending hearing pursuant to Chapter 120.57, Florida Statutes.

The DEPARTMENT cannot provide prehearing safeguards if their prehearing determination is based solely upon their construction of the law concerning the issuance of permits and it is subsequently determined that the DEPARTMENT is improperly construing and applying the the law. An assurance of future compensation makes a mockery of the summary removal provision of the Act when there is no legislative funding to provide compensation in the event of an erroneous destruction of property by the DEPARTMENT.

There is no logical separation of the integral component parts of Chapter 479.105 to allow the striking of offending language within the law. The suggestion of the DEPARTMENT to strike portions of the law will necessitate this Court re-writing the law.

The property interest of the Appellees consists of their interests of the materials in the signs which the DEPARTMENT

seeks to summarily destroy. The property interests of the Appellees in any permits to be issued or their property interests in the right to advertise are subject to a determination of Count II of their complaint which is not before this Court.

The DEPARTMENT should not be allowed to complain that the Appellees have not proved their entitlement to permits as a condition precedent to the determination of the constitutionality of Chapter 479.105, Florida Statutes, when the DEPARTMENT consented to the bifurcation of the trial court proceedings.

Should the Court strike portions of Chapter 479.105, Florida Statutes, as now suggested by the DEPARTMENT, the language as striken should provide the same final effect as the relief granted by the Trial Court.

ARGUMENT

POINT I

WHETHER APPELLEES HAVE BEEN DEPRIVED OF ANY PROPERTY INTEREST ENCOMPASSED IN THE PROTECTION OF DUE PROCESS.

It is undisputed by the parties that before a property interest can be taken from a person by governmental action, that person is to be afforded adequate notice and a fair hearing. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The DEPARTMENT seeks the power to summarily remove and destroy private property prior to and regardless of a pending Chapter 120.57, Florida Statutes, administrative hearing which would determine the legality or permitablitiy of a sign.

The DEPARTMENT intends to summarily remove all signs they post pursuant to Chapter 479.105, unless they are enjoined. (R: 158) Kenneth Michael Towcimak, Chief of the Bureau of Right of Way (R: 290) testified that Chapter 479.105, Florida Statutes, mandated removal of signs that were posted (R: 294) and that the Department possessed no discretion in implementing Chapter 479.105, Florida Statutes. (R: 295) He further testified that there is nothing in the "Notice" which is posted on a sign that advises a sign owner that he may apply for a permit to prevent removal of his sign. (R: 296)

Appellees do not disagree with this Court's ruling in LaPoint Outdoor Advertising v. Fla. Dept., Etc., 398 So2d 1370, (Fla. 1981) which provides that no compensation shall be paid to nonconforming, unlawfully erected billboards. Appellees, DURDEN

and STONE, contend their signs should not be summarily removed and destroyed prior to a determination that their signs are nonconforming or unlawfully erected. Both the Federal courts and the courts of this state have summarily rejected the concept that private citizens may be deprived of property without prior notice and an opportunity to be heard. E.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Davis v. City of South Bay, 433 So2d 1364 (Fla. 4th DCA 1983).

Whether a sign owner has a property interest in the materials used in the construction of his sign is separate and apart from whether he is to be compensated for those materials if his sign was erroneously erected. The DEPARTMENT has not asserted that the sign owners (APPELLEES) do not have a property interest in their sign materials.

The Department relies on Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) which concerns due process in relation to property rights "in a benefit". We are concerned here with the ownership interest of private property, the use of which is controlled or restricted by the legitimate exercise of the police power of the state.

The only instances in which the taking of private property through the police power without the grant of a prior hearing have been upheld are when justified by a compelling public interest deriving from a threat to the public health, safety or morals. See, e.g., State Plant Board v. Smith, 110 So2d 401, 406-407, (Fla. 1959); Larson v. Warren, 132 So2d 177 (Fla. 1961); Denney v. Conner, 426 So2d 534 (Fla. 1st DCA 1985). No such threat is presented here. (R: 170-171) Indeed, the First

District Court of Appeal specifically held in Walker v. DOT, 366 So2d 96 (Fla. 1st DCA 1982) that "the public good contemplated by the Highway Beautification Act is not superior to the right of a citizen to own private property and to be treated fairly by his government with respect to that property." Id. at 100. Absent a "compelling interest" of the type described above, the Courts have "traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes place" (the form of the hearing being dependent upon the importance of the interests involved and the nature of subsequent proceedings, if any). Fuentes v. Shevin, supra. at p. 82.

As stated in Appellees' Statement of the Case and Facts the issue before the Court is solely the constitutionality of Chapter 479.105, Florida Statutes. The DEPARTMENT should not be allowed to complain that DURDEN and STONE have not established a property interest in the issuance of a permit for their signs when the DEPARTMENT consented to the bifurcation of the trial court proceedings and Count II of the Appellees' case has not been litigated in the trial court.

POINT II

WHETHER THERE ARE FACTORS PRESENT IN THIS CAUSE TO JUSTIFY A DEPARTURE FROM THE REQUIREMENT OF PREDEPRIVATION HEARING AND WHETHER THE LEGISLATURE MADE A DETERMINATION FOR SUMMARY REMOVAL OF UNPERMITTED SIGNS PRIOR TO AN ADMINISTRATIVE HEARING.

The DEPARTMENT mistakenly relies on the Report prepared by the Senate Committee on Transportation (Feb. 1984), portions of which are attached to the Department's Brief. The language relied upon by the Department states:

> With regard to signs erected without having obtained the required permit from the department, enforcement is not presently adequate, and that the law should be amended to provide for removal of these signs after notice to the sign owner. (R: 233)

The above language does not state that removal should be in violation of the due process clauses of the State and Federal Constitutions nor does the Report set forth the method adopted in Chapter 479.105, Florida Statutes. It is therefore inappropriate to assume the Report sanctions the statutory scheme employed in Chapter 479.105, Florida Statutes.

The DEPARTMENT suggests that the need to protect revenue may justify summary administration action and relies on Commissioner v. Shapiro, 424 U.S. 614, 98 S.Ct. 1062, 47 L.Ed.2d 278 (1976). Reliance on Commissioner v. Shapiro, is misplaced. Commissioner v. Shapiro, involves a summary seizure of bank account funds for unpaid taxes. The Supreme Court allowed the tax payer to continue with his suit for injunctive relief to determine the validity of the assessment.

Appellees agree that the DEPARTMENT is charged with

"effectively controlling" the erection and maintenance of outdoor advertising signs pursuant to the agreement with the United States Department of Transportation. The agreement is incorporated in Rule 14-10. Rule 14-10 does not provide for the summary predetermination removal of outdoor advertising signs. Therefore, this power is not contemplated in the agreement and the lack of any such power will not frustrate the DEPARTMENT'S ability to "effectively control" outdoor advertising signs under the scope of its agreement.

The cases relied upon by the DEPARTMENT for immediate seizure of property are misplaced. Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) approves stop work orders on surface mining and the statute involved provided for a five day time period for a request for relief from the order. Chapter 479.105 (2), Florida Statutes, encompasses stop work orders and the constitutionality of this section is not before the Court.

Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979) involves a states interest in public safety for driver license suspensions for failure to take a DWI breathalizer test. The statute provided for an immediate post taking hearing.

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) the Supreme Court determined that under Tennessee law, utility service constituted a property right and it could not be terminated without a pretermination hearing.

Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) involved the regulation of fishing by banning the use of certain fish nets. A violation of the act constituted a criminal offense and the Court reasoned the destruction of the criminal agency is not a violation of due process. Chapter 479, Florida Statutes, (1984) is not a penal statute.

Denny v. Conner, 426 So2d 534 (Fla. 1st DCA 1985) approves the summary destruction of fruit trees infested and/or exposed to citrus fruit canker and the destruction was necessary to prevent the spread of the disease. The situation was urgent to protect the public health.

Larson v. Warren, 132 So2d 177 (Fla. 1961) concerns the revocation of a driving privilege not a property right.

State Plant Board v. Smith, 110 So2d 401 (Fla. 1959) involves a destruction of property where there is an obvious and immediate danger to public health, safety, or welfare to prevent the spread of citrus disease.

None of the above urgent situations are before the Court and there is no immediate threat to the publics health, safety or welfare. (R: 170-171)

The DEPARTMENT argues that an aggrieved party may be compensated if it is subsequently determined that the destruction of the Appellees' property was erroneous. Such a position holds no weight when there is no funding provision for such compensation (R: 303), there is no statutory procedure for the awarding of any compensation (R: 301), and the DEPARTMENT further admits there is no legislative authorization for the use of right of way funds to pay just compensation pursuant to

Chapter 479.105, Florida Statutes. (R: 302-303)

The DEPARTMENT insists that if it is found to be wrong in its prehearing destruction of property that it will undo the wrong through compensation or reerecting the sign. The United States Supreme Court has previously held: "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes v. Shevin, supra., at page 82.

Therefore there are no factors of public emergency necessary for the Court to allow a departure from the Constitutional requirement of a predeprivation hearing.

POINT III

WHETHER THE TRIAL COURT ERRED IN STRIKING DOWN THE ENTIRE PROVISION OF CHAPTER 479.105, FLORIDA STATUTES, AND WHETHER THE STATUTORY LANGUAGE IS SEVERABLE FROM THE REMAINDER OF THE PROVISION.

Appellees are in agreement with the DEPARTMENT that the law set forth by this Court in Eastern Airlines, Inc. v. Department of Revenue, 455 So2d 311 (Fla. 1984) is controlling. We find ourselves at difference on how the law should be applied to the statute. It is Appellees' position and that of the trial court that there can be no severance of the invalid parts which would leave the remaining portion of the law complete without the Court rewriting the statute. Therefore, the law must be declared unconstitutional. Eastern Airlines, supra.

Chapter 479.105 (1), Florida Statutes, (1984) provides:

> (1) Any sign which is located adjacent to the right-of-way of any highway on the State Highway System outside an incorporated area or adjacent to the right-of-way on any portion of the interstate or federal-aid primary highway system, which sign was erected, operated, or maintained without the permit required by s. 479.07(1) having been issued by the department, is declared to be a public nuisance and a private nuisance and shall be removed as provided in this section.
>
> (a) Upon a determination by the department that a sign is in violation of s. 479.107(1), the department shall prominently post on the sign face a notice stating that the sign is illegal and must be removed within 30 days after the date on which the notice was posted. However, if the sign bears the name of the licensee or the name and address of the nonlicensed sign owner, the department shall, concurrently with and in addition to posting the notice on the sign, provide a written notice to the owner, stating that the sign is illegal and must be permanently removed within the 30-day period specified on the posted notice. The written notice shall further state that the sign owner has a right to request a hearing, which request must be filed with the department within 30 days after the date of the written notice. However, the filing of a request for a hearing will not stay the removal of the sign.

(b) If, pursuant to the notice provided, the sign is not removed by the sign owner within the prescribed period, the department shall immediately remove the sign without further notice; and, for that purpose, the employees, agent, or independent contractors of the department may enter upon private property without incurring liability for so entering.

(c) For purposes of this subsection, a notice to the sign owner, when required, constitutes sufficient notice; and notice is not required to be provided to the lessee, advertiser, or the owner of the real property on which the sign is located.

(d) If, after a hearing, it is determined that a sign has been wrongfully or erroneously removed pursuant to this subsection, the department, at the sign owner's discretion, shall either pay just compensation to the owner of the sign or reerect the sign in kind at the expense of the department.

Subsection 1 clearly deals with the summary removal of signs. Subsection (1)(a) indicates it is the Department itself which determines whether the sign violates the statute, posts the notice, gives notice to the owner, and requires the notice to provide for a right to a hearing, but indicates the removal will occur regardless of the request for a hearing.

Subsection b provides "pursuant to the notice provided, the sign is not removed by the sign owner within the prescribed period, the department shall immediately remove the sign without further notice;". Subsection b does not leave room to infer that if you delete the last sentence in (a) then (b) means that should someone receive notice and timely request a hearing pursuant to Chapter 120, Florida Statutes, that the Department will not remove the sign.

Subsection d is tied clearly to the predetermination takedown powers set forth in (a).

With Subsections a, b, and d being unconstitutionally defective on their face, subsection c standing alone has no

effect.

The Department suggests to delete the last sentence of (a), all of (b) and all of (d) and it would continue to have authority to control unpermitted signs as under the former law. This position is different from the one taken by the DEPARTMENT in the proceedings below. (R: 338-354)

Appellees suggest they would have no objection to the new position of the DEPARTMENT if this Court determines it meets the statutory severability test.

CONCLUSION

The Department has changed its position on appeal from the one taken below. There is no suggestion that Chapter 479.105, Florida Statutes, is constitutional on its face and the Appellees agree. Point I of the Department rests on the fact that the Appellees did not establish a property right in a permit and the Record shows this issue remains to be litigated. Point II of the Department assumes the Appellees position is correct but suggests a predetermination takedown is authorized under the circumstances and Point III suggests striking pertinent portions of the statute that would still provide the Appellees with the relief requested.

The Order of the Trial Court should be affirmed or portions of the law should be stricken to provide the same effect as ordered by the Trial Court.

Respectfully submitted,

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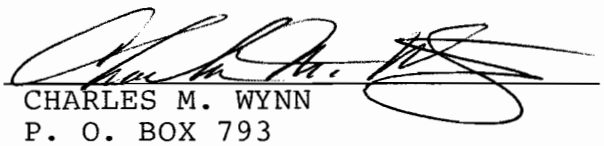
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand to Hon. Maxine F. Ferguson, Alan E. DeSerio, Philip S. Bennet and A. J. Spalla, Attorneys for DEPARTMENT OF TRANSPORTATION at the Haydon Burns Bldg. _ MS 58, 605 Suwannee Street, Tallahassee, Fla. 32301; and Hon. Neil Butler and Cathi C. O'Halloran at Pennington, Wilkinson & Dunlap, P. O. Box 3985, Tallahassee, Florida 32303; this 22nd day of April, 1985.



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